UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FREDE GARCIA, *et al.*	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 97-0005 (GK)**
DISTRICT OF COLUMBIA, *et al.*	)	
Defendants.	)	

MEMORANDUM OPINION ON MOTION FOR RECONSIDERATION

On March 12, 1998, this Court granted Defendants' motion to dismiss the counts of Plaintiffs' complaint based on alleged Fifth and Eighth Amendment violations [#50]. Defendants have moved for reconsideration of the order insofar as it denied the motion to dismiss and/or for summary judgment on those portions of the Plaintiffs' complaint that raise First Amendment issues.[#52] Plaintiffs have filed an Opposition [#57] and all parties have filed supplemental memoranda [# # 59, 61]. Plaintiffs have filed an Amended Complaint, alleging only claims related to violation of the First Amendment [# 63]. Finally, Defendants filed a Reply, incorporating by reference the motions they filed directed to the original complaint and submitting those motions as their response to the Amended Complaint [# 62]. On consideration of all the pleadings, the applicable case law, and the entire record herein, the motion for reconsideration will be denied.

In its original Memorandum Opinion, the Court held that the complaint set forth the prima facie elements of a claim for retaliation for activities protected by the First Amendment, that is, the filing of grievances by the Plaintiffs. Plaintiffs alleged that Garcia had been sexually propositioned

by Defendant Chapa, that Garcia (with the assistance of Tirado) and Caldwell had filed grievances against Chapa, and that all three Plaintiffs had been penalized in retaliation for the exercise of their First Amendment right to seek redress of grievances. They further alleged that they had been discriminated against by Defendants Brown and Stevens, who had been assigned to investigate the grievances against Chapa. As to Defendant Lt. Harvey, the motion to dismiss or for summary judgment was denied because he was charged with direct personal responsibility, not with respondeat superior responsibility. As to all Defendants, the defense of qualified immunity was rejected. Qualified immunity would not apply, the Court held, because any reasonable correctional officer would have known that the acts alleged (retaliation for exercise of First Amendment rights) were in violation of constitutional rights.

A. Reconsideration as to Defendant District of Columbia

Defendants' motion for reconsideration first questions whether the case against the District of Columbia has been dismissed. They note that Monell v. Department of Social Services, 436 U.S. 658 (1978) precludes suit against the District because its liability would rest solely on a theory of respondeat superior and none of the other Defendants had final policymaking authority.

The claim against the District of Columbia has been dismissed for the reasons stated on pages 8-9 of this Court's Memorandum Opinion filed March 12, 1998. Plaintiffs have presented no new arguments. The case against the District of Columbia will stand dismissed.

B. Reconsideration as to Defendants Brown and Stevens

The Defendants next argue that the case should be dismissed as to Correctional Officers Brown and Stevens because Plaintiffs do not allege that these officers participated in the alleged retaliation. They claim that these officers were involved only in the fact-finding committee established

to investigate Plaintiff Garcia's allegations against Defendant Chapa. Defendants argue that there is no basis to infer a retaliatory motive in the decision of these officers to deny the grievance against Defendant Chapa.[1] Moreover, Defendants argue that the actions of these officers did not result in any punishment of Plaintiffs and therefore did not cause any injury to them. They suggest that the mere rejection of a grievance is not the kind of injury that would support a Section 1983 claim. Moreover, Defendants Brown and Stevens contend that they are entitled to qualified immunity because they were exercising the discretionary function of investigating Plaintiff's grievance.

In response, Plaintiffs argue that Brown and Stevens repeatedly disregarded and violated proper procedures in investigating the grievance. Plaintiffs argue that these Defendants tacitly approved or were deliberately indifferent to the retaliation against Plaintiffs for the filing of the grievance. On the issue of qualified immunity, Plaintiffs argue that Brown and Stevens should have known that retaliation for the filing of grievances would violate their constitutional rights.

According to the amended complaint, Defendant Stevens reviewed Garcia's written grievance against Chapa and signed a receipt for it (Cpt. ¶ 14). This Defendant also advised Garcia, in Spanish, that he was required to sign a "cease and desist" order which stated that he had filed a complaint against Chapa. (Cpt. ¶ 14). In fact, the order Garcia signed, which was in English, stated that Chapa

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[1] On reconsideration, Defendants originally argued that clear and convincing evidence of such a motive must be produced prior to discovery, citing the decision of the Court of Appeals for this Circuit in Crawford-El v. Britton, 93 F.3d 813 (D.C. Cir. 1996), rev'd, __U.S. ___, 118 S. Ct. 1584 (1998). Their Supplemental Memorandum, filed after Crawford-El was reversed by the Supreme Court, concedes that evidence of improper motive is irrelevant to the defense of qualified immunity, but notes that it may be an essential element of Plaintiffs' case. They point out that the Supreme Court retained the rule that in opposing a "properly supported" dispositive motion, a plaintiff cannot rely on "general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive." Crawford-El, 118 S. Ct. at 1598.

had filed "an allegation of sexual misconduct against" Garcia. (Cpt. ¶ 14). That order was later corrected. (Cpt. ¶¶ 24, 26). The complaint further alleges that Defendant Stevens "had himself assigned to" the committee designated to investigate Garcia's charges against Chapa, "in an effort to subvert the objections of the Fact Finding Committee". (Cpt. ¶ 16). Plaintiff alleges that under the rules of the institution, Stevens should not have sat on that committee because he had been involved in the preliminary investigation of the incident. (Cpt. ¶ 16).

The complaint further alleges that Defendant Stevens had prejudged the case, and that both Brown and Stevens refused to call two of Garcia's other witnesses, one of whom was Tirado. (Cpt. ¶ 18). Plaintiff alleges that the Deputy Director of the institution later directed Defendants Brown and Stevens to reopen their investigation and interview the two previously uncalled witnesses. (Cpt. ¶ 21) When Tirado appeared before Defendants Brown and Stevens, both Defendants admitted that they "had previously reached a decision that Garcia's allegations were without foundation" and that they were interviewing him only because of the direction from the Deputy Director. (Cpt. ¶ 28)

These allegations paint a picture far less innocent than that described by Defendants. Assuming the truth of these allegations, a reasonable juror might infer that Lt. Stevens purposely misled Plaintiff Garcia as to the nature of the document he signed, and that he sat on the investigative committee with the intention of undermining its conclusions. Although the allegations against Defendant Brown are less detailed, her cooperation in declining to interview two defense witnesses until commanded to do so by the Deputy Director are suggestive of prejudgment of Garcia's grievance. Defendants have not submitted any declarations by either Brown or Stevens that would rebut these inferences. Summary judgment for these Defendants was properly denied.

. Reconsideration as to Defendants Chapa and Harvey

As to Defendant Chapa, Defendants admit that Plaintiffs have made a colorable allegation of a First Amendment violation in the filing of allegedly retaliatory disciplinary reports. They argue that Plaintiffs have not suffered any injury from Chapa's actions because they were not subjected to any punishment as a result of the disciplinary reports, and therefore there is no compensable claim. They also assert that parole consideration could not be affected because the reports were not placed on Plaintiffs' files.[2] Defendants interpret Plaintiffs' claim against Harvey as being only that he failed to report Garcia's complaint against Chapa for sexual harassment. They rely on Lt. Harvey's declaration filed in support of the motion for summary judgment,[3] and their statement of uncontested material facts. The only real injury alleged, they argue, was the taking of Tirado's radio during a shakedown, which would not support not a federal claim.

In response, Plaintiffs argue that they were injured by being targeted during shakedowns, receiving disciplinary reports for violations that did not result in reports for other inmates, being transferred to the Maximum Security Facility because of fraudulent disciplinary reports, and, as to Plaintiff Caldwell, by being placed in segregation. They allege that they were required to postpone

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[2] Plaintiffs have not submitted any affidavits contradicting Lt. Harvey's assertion that the disciplinary reports filed by Chapa were not forwarded to an Adjustment Board and were not placed in their files.

[3] The Court notes that Defendants have submitted a declaration from only Lt. Harvey in support of their motion. Although they reiterate their disbelief that Chapa, "a grandmother in her fifties", would proposition Garcia, a young inmate, they have never submitted a declaration from Chapa denying that she propositioned him or denying that she harassed Plaintiffs by filing retaliatory disciplinary reports. Finally, neither the fact of being a grandmother nor the age of fifty would automatically preclude the activities alleged.

scheduled parole hearings because parole might have been denied merely because they had been falsely charged with serious disciplinary offenses.

The following allegations appear in Plaintiffs' Amended Complaint[4]:

- On or about September 3, 1996, Defendant Chapa made a sexual proposition to Plaintiff Garcia, which he rejected (¶ 10).
- On September 6, 1996, Chapa shouted at Garcia for having bread and took him to the Control Center, where Defendant Harvey gave him 14 days "extra duty" for having bread. Garcia tried to explain that Chapa's conduct was in retaliation for his refusal of a sexual relationship. Harvey did not report the grievance. (¶ 11).
- On September 10, Chapa cited Garcia for drinking coffee in another resident's room. These were the first disciplinary reports Garcia had received while at a Department of Corrections facility. (¶ 19). On Plaintiff Caldwell's advice and with Plaintiff Tirado's assistance, Garcia prepared a formal grievance against Chapa and presented it to the Staff Teacher, who immediately took it to the Associate Warden for Programs. (¶ 13).
- On several nights between September 7 and September 20, at about 3:30 a.m., Chapa ordered Garcia to report to the Control Center. Garcia repeatedly advised Harvey of Chapa's harassment and retaliation. Harvey disregarded mandated grievance procedures. (¶ 12).
- Chapa learned that Tirado was assisting Garcia in the grievance procedures and on September 16, 1996, filed a fraudulent report against Tirado. (¶ 15; Ex. 4).
- On October 8, 1996, Chapa told Caldwell she would file a disciplinary report against him for eating during the count. Caldwell submitted a formal grievance against her. On October 28, Chapa told Caldwell she would file a disciplinary report against him for having his TV on during the count. He filed another formal grievance against her. (¶ 19; Exs. 7, 8). The reports by Chapa were the first disciplinary reports Caldwell had received while at a Department of Corrections facility. (¶ 19).
- On November 21, 1996, Chapa told Garcia she would file a report against him for being improperly dressed. She refused to accept a copy of a cease and desist order relating to Garcia's original grievance from Caldwell. Instead, she reported to Lt. Harvey that Caldwell had interfered with her count. Another lieutenant, Lt. Thomas, took Caldwell to the Control Center, handcuffed him, and told him he shouldn't become involved in Garcia's problems. Lt. Harvey appeared and told Caldwell he must not assist Garcia, and the next time he learned that Caldwell was assisting Garcia or any other inmate, he (Harvey) would have him placed in punitive segregation in a summary fashion. (¶ 29).
- On November 23, Lt. Thomas read Caldwell the report filed by Chapa the previous night, and issued a verbal reprimand. (¶ 30).
- On December 3, there was a "mass shakedown" of the unit. A captain and Lt. Harvey

[4] Essentially the same allegations were in the original complaint, filed by Plaintiffs pro se.

> directed that the three plaintiffs be "target[ed]" for "special handling." Tirado and Garcia were cited for possessing alleged contraband, which were in fact items sold to them from the DCDC canteen and Tirado's personal radio. Other inmates who possessed similar items were not cited. (¶ 32).

The Amended Complaint (to which the Defendants have addressed their filings on reconsideration) alleges actions by both Chapa and Harvey which, if proven, would support a finding that both of these Defendants retaliated against Plaintiffs because of their participation in the filing of grievances against Chapa. A prisoner's right of access to the courts is protected under the First Amendment's guarantee of the right to petition the government for a redress of grievances. Pryor-El v. Kelly, 892 F. Supp. 261, 274-75 (D.D.C. 1995). The filing of a grievance by an inmate also is protected by the First Amendment. [3] Actions taken by prison officials to retaliate against an inmate for the filing of a grievance may "chill" the exercise of these First Amendment rights and therefore be actionable. Hines v. Gomez, 108 F.3d 265 (9th Cir. 1997); Harris v. Ostrout, 65 F.3d 912 (11th Cir. 1995); see DeLoach v. Bevers, 922 F.2d 618, 620 (l0th Cir. 1990); Wolfel v. Bates, 707 F.2d 932 (6th Cir. 1983); Haymes v. Montanye, 547 F.2d 188 (2d Cir. 1976); Byrd v. Moseley, 942 F. Supp. 642, 644 (D.D.C. 1996)(dictum).

Evidence that actions by correctional officers were taken in retaliation for the exercise of protected conduct may be inferred from the fact that the acts occurred shortly after the filing of a grievance, and that the inmate previously had a good disciplinary record. See Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995); Smith v. Deckelbaum, 1998 WL 433926 (S.D.N.Y. 1998). Assuming all facts alleged by Plaintiff to be true, a reasonable jury could conclude the challenged actions of Chapa and Harvey were taken in retaliation for the filing of grievances against Chapa, based on the

[3] Exhaustion of administrative remedies, by the filing of a grievance, is a prerequisite to maintaining an action in court under the Civil Rights Act, 42 U.S.C. § 1983. 42 U.S.C. § 1997e(a).

following "chronology" of events: Garcia, with the assistance of Caldwell and Tirado, filed a grievance against Chapa (¶ 13); Chapa harassed Garcia by requiring him to report to the Control Center in the middle of the night (¶ 12); Chapa filed a false report against Tirado (¶ 15); Chapa told Caldwell she would file reports against him (¶ 19); Chapa told Garcia she would file a report against him (¶ 29); Harvey threatened Caldwell with punitive segregation if he continued to assist other inmates (¶ 29); Caldwell was reprimanded based on a report by Chapa (¶ 30); and all Plaintiffs were treated differently during a unit shakedown (¶ 32). Moreover, the Plaintiffs allege that they had good disciplinary records prior to the reports they claim were retaliatory. (Cpt. ¶ 34).

The Defendants assert in their Supplement to Motion for Reconsideration that the "primary thrust" of their motion "is that Plaintiffs have not alleged any constitutionally recognizable injury, regardless of whether or not any of the individual Defendants desired retaliation." (Supp. at 3). Defendants fail to appreciate that "[b]ecause the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself." Dixon v. Brown, 38 F.3d 379 (8th Cir. 1994). Accord, Hershberger v. Scaletta, 33 F.3d 955 (8th Cir. 1994); see Franco v. Kelly, 854 F.2d 584 (2d Cir. 1988)(disciplinary charges expunged); Smith v. Deckelbaum, supra (not guilty on disciplinary charges). Defendants have cited no case that holds that an inmate must be subjected to official punishment such as loss of good time, denial of parole, or transfer to segregation in order to state a

claim for illegal retaliation.[4] The Court of Appeals for this Circuit has approved as "sensible" a standard of injury described as "whether an official's acts 'would chill or silence a "person of ordinary firmness" from future First Amendment activities.' " Crawford-El v. Britton, 93 F.3d at 826.[5] Plaintiffs have alleged that they were threatened with disciplinary reports, that reports were filed against them (whether or not those reports resulted in tangible punishment), that they were harassed by being required to report to the Control Center in the middle of the night, and were reprimanded.[6] These are acts which might well "chill" a "person of ordinary firmness" from exercising his First Amendment right to complain about the behavior of a prison guard. These allegations are sufficient

[4] The Department of Corrections' own definition of retaliation provides support for the proposition that non-punitive harassment of an inmate may constitute actionable conduct. See Exhibit 20 attached to the Amended Complaint (Department of Corrections Directive # 3350.2A, entitled Sexual Misconduct Against Inmates). In that document, retaliation is defined as "[a]n act of vengeance, covert or overt action, or threat of action, taken against an inmate in response to the inmate's complaint of sexual misconduct or cooperation in the reporting or investigation of sexual misconduct, regardless of the merits or the disposition of the complaint." (Ex. 20, p. 2). Retaliation can include "unnecessary discipline; intimidation; . . . unjustified denials of privileges or services." (Ex. 20, p. 2).

[5] Judge Williams quoted Crawford-El v. Britton, 844 F. Supp. 795, 801 (D.D.C. 1994), which in turn quoted Bart v. Telford, 677 F.2d 622 (7th Cir. 1982).

[6] Plaintiffs Caldwell and Tirado allege that they were transferred to the maximum security facility in retaliation for the grievances filed against Chapa, and Plaintiff Garcia alleges that he was transferred out of the honor dorm in retaliation. See Exhibit 21 attached to the Amended Complaint. They argue that proper procedure was not followed in effecting the housing transfers, and that the Maximum Security Facility is an outdated structure which violates requirements of the American Correctional Association. Defendants have submitted documents indicating that these transfers were for substantive offenses not related to the difficulties with Chapa. See Reply to Supplemental Memorandum in Opposition to Motion for Reconsideration and Response to Amended Complaint, at 3 - 5, and attachments. The Court does not make any findings on this disputed issue.

to withstand a pre-discovery dispositive motion.[7] It is a factual issue whether the Defendants' actions would be sufficient to chill a reasonable person in the exercise of First Amendment rights.

Finally, any reasonable correctional officer must know that retaliation for the filing of a grievance would violate the inmate's constitutional rights, see Crawford-El v. Britton, 118 S. Ct. 1584, 1593 (1998); Farmer v. Moritsugu, No. 98-5087, slip op. at 6-7 (D.C. Cir., December 18, 1998). Therefore the Defendants would not be entitled to qualified immunity, assuming that Plaintiffs can prove the allegations of their Amended Complaint. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Accordingly, the motion for reconsideration as to the First Amendment claims against defendants Chapa and Harvey will be denied.

An appropriate order will be entered.

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GLADYS KESSLER
United States District Judge

DATE:

[7] Cf. Bradley v. Hall, 64 F.3d 1276, 1281 (9th Cir. 1995). The court had previously held that a policy requiring prisoners to submit legal papers to officials for copying could deny the prisoners meaningful access to the court. In Bradley, the court pointed out that "[t]he threat of punishment for an impolitic choice of words [in a grievance] burdens the prisoner's right of meaningful access to the courts at least as much as submitting confidential memos to prison officials for copying and occasional perusal." (Emphasis added.)